STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 12, 2008
v	No. 277282 Oakland Circuit Court
PATRICIA LYNN HAKES, Defendant-Appellant.	LC No. 2005-204801-FH

Before: Whitbeck, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Defendant, a legal secretary, was convicted of embezzling more than $400,000 from the victim's law firm by writing numerous checks to herself and paying her credit cards with funds belonging to the law firm. Defendant appeals as of right her convictions following a jury trial for three counts of embezzlement of $20,000 or more, MCL 750.174(5)(a). Defendant was sentenced to three concurrent prison terms of three to ten years each and to pay restitution in the amount of $442,000. We affirm.

Defendant first argues that the evidence was insufficient to sustain her convictions. We disagree. To ascertain whether sufficient evidence was presented at trial to support a conviction, we view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). We will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses, *id.* at 514, and must "draw all reasonable inferences and make credibility choices in support of the jury verdict," *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of embezzlement by an agent are:

> (1) the money in question belonged to the principal, (2) the defendant must have a relationship of trust with the principal as an agent or employee, (3) the money must come into defendant's possession because of the relationship of trust, (4) the defendant dishonestly disposed of or converted the money to [her] own use or secreted the money, (5) the act must be without the consent of the principal, and (6) at the time of the conversion, the defendant intended to defraud

> or cheat the principal. [*People v Lueth*, 253 Mich App 670, 683; 660 NW2d 322 (2002).]

The prosecution also had to prove that $20,000 or more was embezzled. MCL 750.174(5)(a).

There was evidence that after defendant worked for the firm as a legal secretary for two years, the victim added defendant as a second signer on the firm's bank account in 2001. At that time, the parties had a good working relationship, and the victim had confidence in defendant. As a result, defendant had access to the firm's bank account, all client revenues and, starting in mid-2002, had the ability to write and print checks through the firm's computer accounting program. In fact, defendant was the only person with the password for the program.[1] From this evidence, the jury could infer that the victim and defendant had a relationship of trust and that the money came into defendant's possession because of that relationship. *Nowack*, *supra*.

When financial issues arose in 2003 and 2004, the victim had an expert in forensic accounting review the firm's records. He concluded that defendant had improperly removed more than $300,000 from the firm through improper and cunning accounting methods. The expert found that defendant took approximately $104,000 in 2002, $138,000 in 2003, and $80,000 in 2004 by writing herself checks and paying her personal credit cards with firm funds. The victim did not authorize defendant to write checks to herself, make payments on her personal credit cards, or use the firm's credit card machine for personal reasons. Despite defendant's claims, there was no evidence that she gave money to the firm or the victim. In addition, defendant had extensive gambling losses during the relevant timeframe, and defendant's gambling habits greatly decreased after she stopped working for defendant. The jury could reasonably infer from this evidence that defendant converted firm funds to her own use, acted without the victim's consent when doing so, and intended to defraud the victim.[2] *Id.* Although defendant presented a different account, the jury determines which account was credible. *Nowack*, *supra.* Viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant's convictions for embezzlement. *Wolfe*, *supra* at 515.

Defendant further argues that the trial court abused its discretion in scoring offense variable 19 of the sentencing guidelines because it impermissibly considered that she exercised her right to testify and concluded that she committed perjury. We disagree. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.*

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[1] The victim had to "break into" the computer accounting program because only defendant had the password and defendant did not return the victim's calls.

[2] Intent can be inferred from "all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998), lv den 459 Mich 866 (1998) (citations omitted).

Under MCL 777.49(c), a trial court may score ten points under OV 19 if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." Interfering or attempting to interfere with the administration of justice is broadly interpreted when assessing OV 19. *People v Barbee*, 470 Mich 283, 286-287; 681 NW2d 348 (2004). Any acts by a defendant that interfere with law enforcement officers and their investigation of a crime, even if they occur before charges are filed, may support a score for OV 19. *Id.* at 288. Those acts may include deterring a witness from testifying or reporting a crime, *Endres*, *supra* at 420-421, or providing false information to law enforcement officers in the process of investigating a crime, *Barbee*, *supra* at 287-288.

In scoring OV 19 at ten points, the trial court stated:

> The issue is the scoring of O.V.–19 which is interference with the administration of justice. And the Court first looked at the letter to [the victim] that was sent prior to the charges. The testimony by defendant was that it was sent as a request of the police officer but the Court really doesn't know if, in fact, that was the case.
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> *The court finds that the letter was a direct attempt to intimidate the victim by saying she would testify against her in a civil case, and there was an ongoing criminal investigation going on, and the Court finds that that was an attempt to interfere with that investigation and that O.V.-19 is properly scored.*
>
> In addition, the testimony of the defendant is incredible and the Court finds that she perjured herself and she went to great length not only to lie but to humiliate the victim. The court finds O.V.-19 properly scored and the guidelines are five to 23. [Emphasis added.]

In the letter, defendant offered to not testify against the victim in a pending civil case if she and the victim could reach an agreement and settle this case. Defendant noted that she was "sure" the victim did not want "some of the allegations to become public." The trial court could properly conclude that the letter was a direct attempt to intimidate the victim, which constituted an attempt to interfere with the investigation or the administration of justice. Because the letter supports the scoring of OV 19, we uphold the scoring decision. *Endres*, *supra*.

Defendant also argues that the trial court erred when it departed from the sentencing guidelines recommended sentence range of 5 to 23 months and sentenced her to three to ten years' imprisonment for her convictions. We disagree. Under the sentencing guidelines statute, the trial court must ordinarily impose a minimum sentence within the calculated guidelines range, MCL 769.34(2) and (3); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003), but may depart from the appropriate sentence range if it "has a substantial and compelling reason for th[e] departure and states on the record the reasons for departure," MCL 769.34(3). An offense or offender characteristic already considered in determining the guidelines range may not be considered unless the court finds, based on the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b).

"Substantial and compelling" constitutes strong language intended only to apply in "exceptional cases." *Babcock*, *supra* at 257-258. The facts considered "must be actions or

occurrences that are external to the minds of the judge, defendant, and others involved in making the decision and must be capable of being confirmed." *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991) (citation omitted). Whether a factor exists is reviewed for clear error, but we review de novo whether a factor is objective and verifiable. *Babcock*, *supra* at 265, 273. The trial court's determination that objective and verifiable factors constitute a substantial and compelling reason to depart from the minimum sentence range is reviewed for an abuse of discretion. *People v Armstrong*, 247 Mich App 423, 424; 636 NW2d 785 (2001). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Babcock*, *supra* at 274.

The trial court provided the following reasons for departure:

> I have reviewed the report, note you don't have a prior record. You do have two daughters. This did involve embezzling funds from your employer. You were a legal secretary and an office manager. You had access to the company accounts and payroll and testified that you had no involvement in these crimes.
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> This Court finds that the victim here was particularly vulnerable because was pretty much a sole practitioner of 27, 28 years of having her own firm. She found somebody she could trust to handle the office and I'm sure she was very delighted when she found someone that she could put her trust in so that she could concentrate on taking care of her clients.
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> The Court does find substantial and compelling reasons to exceed the guidelines, first of all because I don't believe the guidelines take into account adequately the amount of money taken here because there were hundreds of thousands of dollars. So, I think *that alone is reason*.
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> But the Court also finds the absolute complete lack of any remorse makes it very unlikely that there will be rehabilitation here. The fact that the victim had to be humiliated along the way. The fact that the victim was vulnerable, but particularly the fact that the tables were turned very much in this trial, putting the victim on trial in many respects. And I have to compliment the victim, even though she was an attorney, she - - she conducted herself extremely appropriately and I think that gave credit to the - - the legal profession and the way the whole thing was handled. [Emphasis added.]

The trial court's primary reason for departure was "the amount of money taken." Although defendant received a score of ten points for OV 16, because the property in issue "had a value of more than $20,000.00," MCL 777.46(1)(b), we have upheld as proper departures where the amount of money taken greatly exceeded the statutory minimum for the offense. *People v Cain*, 238 Mich App 95, 131-132; 605 NW2d 28 (1999). Defendant took more than $442,000. Given the great disparity between the threshold amount of money required to score OV 16 and the quantity of money involved here, the trial court did not err by finding that the value of the property obtained was not adequately reflected in the scoring of OV 16.

The trial court also relied on defendant's complete lack of remorse. Defendant challenges this reason as an improper consideration of her failure to admit guilt. "Resentencing is warranted if it is apparent that the court erroneously considered the defendant's failure to admit guilt, as indicated by action such as asking the defendant to admit [her] guilt or offering [her] a lesser sentence if [she] did." *People v Conley*, 270 Mich App 301, 314; 715 NW2d 377 (2006), lv den 477 Mich 931 (2006) (internal quotations and citation omitted). The trial court did not ask defendant to admit guilt or offer her a lesser sentence if she did. Rather, the court clearly indicated that it considered defendant's lack of remorse as demonstrated by, inter alia, the victim being humiliated and "put on trial,"[3] and the court related the lack of remorse to defendant's diminished potential for rehabilitation. Failure to demonstrate a lack of remorse may be considered in determining a defendant's potential for rehabilitation. *People v Spanke*, 254 Mich App 642, 649-650; 658 NW2d 504 (2003).

Accordingly, there exist objective and verifiable reasons justifying departure.[4] For the same reasons, the extent of the departure, 13 months, is proportionate to the seriousness of the circumstances surrounding the offense and the offender.[5] See *Babcock*, *supra* at 264, 272.

Defendant's last argument is that the trial court erred in ordering her to pay $442,000 in restitution without considering her ability to pay. We disagree. Because defendant failed to challenge the restitution award, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999).

Defendant's claim is without merit. The Crime Victim's Rights Act, MCL 780.766(2), requires a defendant to "make full restitution to any victim of the defendant's course of conduct . . . ." The restitution statute, MCL 780.767(1), provides that "[i]n determining the amount of restitution . . . the court shall consider the amount of the loss sustained by any victim as a result of the offense." Defendant mistakenly relies on an earlier version of the restitution statute. MCL 780.767 was amended, effective June 1, 1997, striking all references to ability to pay as a factor to be considered when determining the amount of restitution. *People v Crigler*, 244 Mich App 420, 428; 625 NW2d 424 (2001). Under the amended statute, the "'amount of the loss sustained' is now the only factor to be considered." *People v Gubachy*, 272 Mich App 706, 711; 728

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[3] Defendant had filed a grievance against the victim with the Attorney Grievance Commission and had filed bankruptcy in an attempt to not pay back the victim.

[4] If a trial court articulates multiple reasons for a departure, but some of the reasons are found to be invalid, this Court must determine whether the trial court would have departed, and would have departed to the same degree, on the basis of the valid reasons alone. *Babcock*, *supra* at 260, 273. Having reviewed the record and scrutinized the sentencing transcript, we are satisfied that the trial court would have imposed the same sentence on the basis of the valid factors alone.

[5] We also note that if defendant were charged under the current statute, embezzlement over $100,000 is punishable by up to 20 years in prison, and her sentence falls at the bottom of the current guidelines. See MCL 750.174(7), effective 3/30/07.

NW2d 891 (2006). Consequently, it was not plain error for the trial court to order restitution without considering defendant's ability to pay.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly